

Holland+Knight

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Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville, FL 32202-3622
www.hklaw.com

March 25, 2008

DOMINIC C. MACKENZIE
904-798-7303
InternetAddress:
donny.mackenzie@hklaw.com

PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

Ms. Michelle Wolfe
Office of Counsel
U.S. Army Corps of Engineers
Jacksonville District
701 San Marco Blvd.
Jacksonville, FL 32207

Re: Ten Mile Creek Project, St. Lucie County, Florida
Request for Documents and Inspection per 5 U.S.C. § 552 ("FOIA").

Dear Ms. Wolfe:

Having not heard from you yesterday, and based on our conversation Monday afternoon wherein you informed me your superiors had instructed you staff up the case and ready it for filing, I assume the Corps is not interested in entering into a tolling agreement. As such, Post, Buckley, Schuh & Jernigan respectfully requests that it be provided the various documents, materials and things it has requested throughout this matter. Specifically, it requests that it be provided copies or access to the following:

1. All documents, materials and things which the Department Of The Army, Jacksonville District Corps of Engineers (The "Corps of Engineers") contends support its claims against Post, Buckley, Schuh and Jernigan, Inc. and/or Mactec Engineering and Consulting, Inc. for Architect-Engineer (A-E) liability arising under Contract No. DACW17-9-D-0051, dated October 5, 1999, including, without limitation, Task Orders No. 4, 7, and 9 (the "Contract") in connection with the Ten Mile Creek Project, St. Lucie County, Florida ("the Project"); more particularly described in Contracting Officer Griselle Gonzalez's letter to Elliott L. Grosh dated February 22, 2008. A copy of said letter is attached hereto as Exhibit A for specific and quick reference.
2. Any and all expert reports prepared by or on behalf of the Corps of Engineers in connection with its claims against Post,

EXHIBIT

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Buckley, Schuh and Jernigan, Inc. and/or Mactec Engineering and Consulting, Inc. for Architect-Engineer (A-E) liability arising under the Contract.

3. Any and all reports along with supplements, exhibits, tabulations, calculations, worksheets, and/or attachments prepared by or for the Corps of Engineers in connection with the Project.
4. Any and all photographs, drawings, depictions, maps, models, motion pictures, videotapes, DVD's, CDs, or plats pertaining to any fact or issue involved in the claims asserted by the Corps against Post, Buckley, Schuh and Jernigan, Inc. and/or Mactec Engineering and Consulting, Inc. for Architect-Engineer (A-E) liability arising under the Contract.
5. Any and all photographs, drawings, depictions, maps, models, motion pictures, videotapes, DVD's, CDs, or plats depicting the condition of the Project for which the Corps of Engineers is either concerned or asserts a claim in connection with the Project.
6. Any and all agreements entered into by the Corps of Engineers with anyone in connection with the Project.
7. All field data including Piezometer readings collected and/or recorded in connection with the Project.
8. All cost estimates, invoices, proof of payments, calculations, tabulations and backup documentation prepared, reviewed, referred to, used or relied upon by the Corps of Engineers in arriving at the damages and costs estimates reflected in Enclosure 1 of Contracting Officer Griselle Gonzalez's letter to Elliott L. Grosh dated February 22, 2008.
9. Any and all documentation and/or expert reports explaining and detailing the Corps of Engineering's findings or assertions relating to its claims asserted in connection with the Project, including but not limited to all documents, materials and things the Corps of Engineers relies upon to determine the Project's seepage system will not function as intended.
10. All documents, materials and things reflecting design or redesign of the soil cement system for the Project including but not limited to specific soil-cement formulas and calculations relating to the soil-cement's resistance to uplift for all designs implemented by the Corps of Engineers.

11. Any and all documents, materials and things including photographs and/or videotapes, DVDs or CDs evidencing seepage occurring into Canal 95 or any other waterway or tributary connected to the Project.
12. All Progress Meeting notes and minutes in the possession of the Corps of Engineers relating to the Project.

In addition, PBS&J respectfully requests that it be granted access to view and inspect the premises and project in question.

To the extent necessary, please consider this request as one brought under the Freedom of Information Act, as amended, 5 U.S.C. § 552 ("FOIA"). If the Corps of Engineers claims an exemption for any requested records or portions of requested records, FOIA requires that the Corps of Engineers provide all reasonably segregable, non-exempt portions of such records, together with a detailed list and descriptions of the records or portions thereof for which the Corps of Engineers claims an exemption and a discussion of the reasoning supporting the claimed exemption. To the extent that documents are located before the entire FOIA search is complete, we request that the Corps of Engineers provide a partial response to our request as information becomes available.

Holland & Knight will reimburse the Corps of Engineers for the reasonable costs of producing the requested records provided that such costs do not exceed \$1,000. If the Corps of Engineers expects such costs to exceed \$1,000, please contact me for further instructions.

Sincerely,

HOLLAND & KNIGHT LLP



Dominic C. MacKenzie

DCM:ast
Enclosures

cc: Becky Schaffer, Esq. (w/enclosures)
Elliot Grosh (w/enclosures)
Broughton Lang (w/enclosures)



REPLY TO
ATTENTION CF

DEPARTMENT OF THE ARMY
JACKSONVILLE DISTRICT CORPS OF ENGINEERS
P.O. BOX 4970
JACKSONVILLE, FLORIDA 32232-0019

February 22, 2008

Contracting Division

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Elliott L. Grosh, P.E. BCCE
Senior Vice President
Mr. Avinash Gupta, P.E.
Senior Vice President
Mr. Eugene H. Yerkes, AICP, P.E.
Program Manager
Post, Buckley, Schuh & Jernigan, Inc.
7785 Baymeadows Way, Suite 202
Jacksonville, Florida 32256

RE: A-E Liability under Contract No. DACW17-99-D-0051, Task Orders No. 4, 7, and 9, for the Ten Mile Creek Project, St Lucie County, Florida.

Dear Messrs. Grosh, Gupta and Yerkes:

In accordance with the provisions of FAR 52.236-23, Responsibility of the A-E Contractor, you are hereby notified that the Corps of Engineers, Jacksonville District, intends to pursue an A-E liability action against Post, Buckley, Schuh & Jernigan, Inc. (PBS&J) related to the services provided under Contract No. DACW17-99-D-0051, Task Orders No. 4, 7, and 9, for the Ten Mile Creek Project, St. Lucie County, Florida. PBS&J had been previously notified of errors and omissions in their design of the Ten Mile Creek Project in our letters dated October 22, 2007, November 13, 2007, November 21, 2007, December 21, 2007, January 29, 2008, February 15, 2008, and February 20, 2008.

The seven issues which have been identified as involving A-E liability are as follows:

- 1) Seepage Management. Sufficient engineering analysis was not performed to address seepage and slope stability issues. A review of project site geology indicates highly variable subsurface conditions which were inadequately

-2-

represented by PBS&J in only one generalized cross-section for design purposes. Additionally, other site features such as the adjacent canals and Ten Mile Creek were not included as part of the analysis, resulting in an inadequate blanket drain system and the omission of other seepage control measures.

2) Soil-cement Apron Stability against Uplift. The design does not adequately address the stability of the soil-cement apron when subjected to uplift pressure during rapid drawdown conditions which may adversely affect the integrity of the soil-cement. This is a design deficiency and mitigation measures may be required to assure the integrity of the soil-cement apron.

3) Erosion at the Base of the Soil-cement Apron. The design does not adequately address the potential for soil erosion at the terminus of the soil-cement apron along the interior toe of the embankment. For reservoir pool elevations lower than EL 18 NGVD 29, storm-water runoff from the soil-cement armoring can cause soil erosion sufficient to undermine the apron and, if not addressed, ultimately endanger embankment stability. For reservoir pool elevations near EL 18 NGVD 29, wind-driven waves can have a similar effect. This is a design deficiency and some means of erosion control should have been provided.

4) Erosion of the Downstream Side Slope due to Crest Slope. Erosion of the exterior embankment is caused due to the lack of slope on the crest of the embankment, which directs runoff from the crest down the unprotected exterior face of the embankment, rather than down the interior face, which is protected by the soil-cement apron. A reasonable designer would have shown a slope toward the protected interior face to provide proper drainage.

5) Erosion at the discharge of the STA into Canal 96. Discharge of the STA into Canal 96 is through the STA outlet structure, S-384, which includes a 5 ft x 7 ft single barrel concrete box culvert oriented perpendicular to the canal bank opposite the discharge point. The discharge velocity of the water is such that excessive erosion of the opposite bank takes place and the design did not include an adequate protective measure. This problem was recognized by SFWMD during field inspections and SFWMD independently contracted for placement of riprap upstream and downstream of the discharge point to alleviate this problem.

-3-

6) Survey Issues. In April 2004 Con-Ops field personnel notified Engineering Division of conflicts on the design drawings concerning survey coordinates for the location of Pump Station 382. The construction contractor had three different options to determine coordinates for the pump station from the design documents and two of those three contained incorrect information. After the issue was resolved and construction was allowed to continue on the pump station, the A-E Liability Board met to discuss possible liability actions and recommended that A-E liability be pursued. The Contracting Officer sent a letter to PBS&J on 3 August 2005 stating that the amount of damages to the Government totaled \$113,782 and PBS&J counter-offered \$16,309.98 on 18 August 2005. On 28 March 2006 the Board met and recommended a final offer of \$76,844.68 to the Contracting Officer, based on the cost per day during the time the contractor was under a stop-work order, for transmittal to PBS&J. This issue remains unresolved.

7) Pump Station 382 Wall Dimensions. There were discrepancies between two drawings on the dimensions for a wall in Pump Station 382. As a result of these discrepancies, reinforcing steel that was too short was procured for the wall. The contractor was able to reuse some of the incorrectly-sized reinforcing; however, a mod to the contract resulted in a net cost of \$15,535 being incurred by the Government for rework of the reinforcing steel to the correct size.

A detailed statement of the estimated damages to the Government is shown in Enclosure 1. The damages presented are an initial assessment and will be revised as needed. As the investigation of liability and negotiations proceed, the damages can be updated or revised to reflect the latest findings and circumstances. The damages are categorized as construction costs, ancillary costs and investigation, and recovery costs. These costs are the extra costs that the Government has incurred or anticipates incurring in the future due to the A-E firm's design errors or omissions. The construction costs include those costs in a construction change that would not have been included in the construction contract price had the design been correct. This is in accordance with Engineer FAR Supplement (EFARS) 36.601-3(S-101) and the guidance and procedures in EP 715-1-7, Architect-Engineering Contracting.

The construction cost damages are based either on contract modifications that have been executed or on anticipated corrective actions needed to remedy the design errors. They are corrective actions that are needed due to the negligent design

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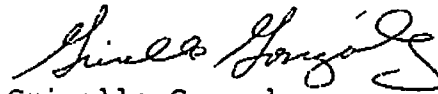
by the A-E. The corrective actions are required for the project to operate safely and meet the authorized intent.

The following is the summary of damages assigned to PBS&J:

Construction Costs	\$ 11,323,786.02
Ancillary Costs	2,259,000.00
Investigation and Recovery Costs	<u>2,116,073.64</u>
 TOTAL COST	 \$15,698,859.66

You are requested to respond to this letter within seven calendar days of the date of this letter, stating the intended course of action of Post, Buckley, Schuh & Jernigan, Inc., to resolve this matter and your availability for a meeting to begin negotiations on our respective positions. Your response should be addressed to the undersigned.

Sincerely,



Griselle Gonzalez
Contracting Officer

Encl

Enclosure 1



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
JACKSONVILLE DISTRICT CORPS OF ENGINEERS
P.O. BOX 4970
JACKSONVILLE, FLORIDA 32232-0019

February 22, 2008

Contracting Division

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Senior Vice President
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Mr. Eugene H. Yerkes, AICP, P.E.
Program Manager
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7785 Baymeadows Way, Suite 202
Jacksonville, Florida 32256

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EXHIBIT

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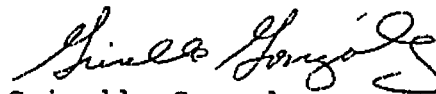
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You are requested to respond to this letter within seven calendar days of the date of this letter, stating the intended course of action of Post, Buckley, Schuh & Jernigan, Inc., to resolve this matter and your availability for a meeting to begin negotiations on our respective positions. Your response should be addressed to the undersigned.

Sincerely,



Griselle Gonzalez
Contracting Officer

Encl

Enclosure 1



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY

JACKSONVILLE DISTRICT CORPS OF ENGINEERS
P.O. BOX 4970
JACKSONVILLE, FLORIDA 32232-0019

April 7, 2008

Office of Counsel

Attention: Mr. Dominic C. MacKenzie
Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville FL 32202-3622

Dear Mr. MacKenzie:

This letter acknowledges receipt of your Freedom of Information Act (FOIA) request received by our office on March 28, 2008, and assigned FOIA No. 08-141 concerning the Ten Mile Creek Project, St. Lucie County, Florida. Your request will be processed under regulations and guidance set forth under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (b) and Army Regulation 25-55.

Under the FOIA we are required to provide a response to you within 20 working days after receiving a request. Therefore, as a rough estimate, you should expect a response from our office by April 25, 2008.

If this office can be of further assistance, please contact us at 904-232-2067.

Sincerely,


Denise Patterson Sturgeon
Paralegal Specialist

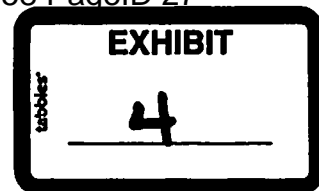




REPLY TO
ATTENTION OF:

DEPARTMENT OF THE ARMY

JACKSONVILLE DISTRICT CORPS OF ENGINEERS
P.O. BOX 4970
JACKSONVILLE, FLORIDA 32232-0019



May 14, 2008

Office of Counsel

Attention: Mr. Dominic C. MacKenzie
Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville FL 32202-3622

Dear Mr. MacKenzie:

This letter is in reference to your Freedom of Information Act (FOIA) request received by our office on March 28, 2008, and assigned FOIA No. 08-141 concerning the Ten Mile Creek Project, St. Lucie County, Florida. You are advised that there will be fees associated with processing your FOIA request. As a commercial requester, you will be charged for search, review and duplication fees. Because the scope of the records you requested is so vast, your FOIA request is estimated to exceed the amount of \$250.00 for processing. You are encouraged to narrow your request by identifying specific documents for access or reproduction.

To memorialize our telephone conversation on May 12, 2008, I informed you that estimated processing costs to respond to your FOIA request would be \$53,000+. The processing of your request involves electronic and physical hand searches for responsive documents and review by approximately 50 professional grade Corps employees, as well as clerical time and duplication costs. For your information, basic costs for searching and reproducing are as follows: clerical searching is charged at \$20.00 per hour and professional search and review is charged at \$44.00 per hour. There is a charge of 25 cents for microfiche and 15 cents per page for copying with a minimum charge of \$15.00. Audiovisual materials are \$6.25 per copy based on the size of each document. Please advise whether you would like to narrow your request.

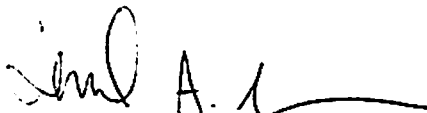
Also, Items 1, 4 and 5 of your request seek a legal conclusion and do not provide a reasonable description of documents in a system of records. As defined by the Department of Justice, the key factor is the ability of an agency's staff to reasonably ascertain exactly which records are being requested and then locate them. Please rephrase these requests and reasonably describe the records sought.

You are required to pay the minimum amount of \$250.00 before we can mail the requested documents to you. You will be notified of the total amount due when the records are assembled. Your check should be made payable to the Finance Officer and mailed to my attention at the address above. Please acknowledge that you are willing to pay the minimum \$250.00 and the final amount after the records are assembled. If you wish to narrow your request, please send your amended request to my attention at the address above. Your response should be received in this office within thirty days of today's date or your request will be considered withdrawn. Please direct any correspondence regarding your FOIA request to my

MAY 16 2008

attention. If this office can be of further assistance, please contact us at 904-232-1737 or 904-232-2067.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer A. Misciagna", with a long horizontal flourish extending to the right.

Jennifer A. Misciagna
Freedom of Information Officer

Holland Knight

Tel. 904-333-2000
Fax 904-333-1872

Holland & Knight LLP
50 North Laura Street, Suite 3700
Jacksonville, FL 32202-3700
www.hknlaw.com

DOMINIC C. MACKENZIE
904-798-7303
Internet Address:
donny.mackenzie@hklaw.com

June 26, 2008

PRIVILEGED AND CONFIDENTIAL

VIA FACSIMILE 904-232-1141

Ms. Jennifer Misciagna
Freedom of Information Officer
U.S. Army Corps of Engineers
Jacksonville District
P.O. Box 4970
Jacksonville, FL 32232-0019

Re: Army Corps of Engineers/Post, Buckley, Schuh & Jernigan
Ten Mile Creek Project, St. Lucie County, Florida

Dear Ms. Misciagna:

This confirms our telephone conference on June 24, 2008 wherein we discussed my client's outstanding Freedom of Information Act request and its status. To reiterate our conference, Post, Buckley, Schuh & Jernigan reminds the Corps of its obligation to provide a partial response to our request as information becomes available to the extent the documents are located before the entire FOIA search is complete. Putting off the issue of the scope of the entire request and the apparent effort required for you to fully comply, we have identified the following items and PBS&J requests that they be produced as soon as possible:

1. Expert reports and analysis concerning the basis of the Corps' claims against PBS&J in this matter as they relate to liability and damages;
2. Dr. Bromwell's work product prepared for or on behalf of the Army Corps of Engineers as it relates to the Ten Mile Creek Project;
3. The work product of any other expert witness retained by or on behalf of the Army Corps of Engineers regarding such persons' analysis of the Ten Mile Creek Project;
4. All materials referenced or relied upon by Ms. Gonzalez in her letter to PBS&J dated February 22, 2008;

EXHIBIT

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June 26, 2008

Page 2

5. All materials referenced by Ms. Gonzalez in her letter dated March 28, 2008;
6. All cost estimates prepared by or on behalf of the Army Corps of Engineers relating to the alleged costs to repair and/or remediate the project in question as specifically referenced in Ms. Gonzalez' March 28, 2008 letter;
7. The "new information" referenced by Dr. Bromwell in the March 12, 2008 meeting of PBS&J, MACTEC and Army Corps of Engineers representatives;
8. All photographs and pictures taken by or on behalf of the Army Corps of Engineers regarding the specific claims asserted by the Army Corps of Engineers against Post, Buckley, Schuh & Jernigan in this matter; and
9. All monitoring data (i.e. piezometer readings) collected by or on behalf of the Army Corps of Engineers for the project in question from January 1, 2005 to the present.

We have informally agreed that these items can be easily and readily identified and produced. As indicated, PBS&J has agreed to pay the reasonable cost of reproducing the requested documents and things and has indicated several times in the past that it is willing to pay up to \$1,000 for the documents in question. Given the discreet listing of items indicated herein, it is reasonably anticipated that the cost for producing the documents identified within this letter will not exceed \$1,000.

We will address your concerns and the other items specifically requested in my client's Freedom of Information Act at a later time. In the interim, however, we appreciate your efforts in facilitating the production of these materials without further delay. Please call if you have any questions.

Sincerely,

HOLLAND & KNIGHT LLP

Signed in Mr. MacKenzie's absence
in order to avoid delay


Dominic C. MacKenzie

DCM/ast

cc: Becky Schaffer, Esq.



REPLY TO
ATTENTION OF:

DEPARTMENT OF THE ARMY
JACKSONVILLE DISTRICT CORPS OF ENGINEERS
P.O. BOX 4970
JACKSONVILLE, FLORIDA 32232-0019

SEP 24 2008

Office of Counsel

Attention: Mr. Dominic C. MacKenzie
Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville FL 32202-3622

Dear Mr. MacKenzie:

This letter is in response to your Freedom of Information Act (FOIA) request received by our office on March 28, 2008, and assigned number 08-141. You requested documents related to the Ten Mile Creek Project, St. Lucie County, Florida. You have received two partial releases and as previously discussed, our office continues to review and collect other documents that are responsive to your request. Please find enclosed the "Final Draft Report on Technical Evaluation of Ten Mile Creek Reservoir, St. Lucie County, Florida."

It is the policy of the Department of the Army to release the maximum amount of information under the FOIA, unless the information is exempt from release and a significant reason exists for non-disclosure. Some of the records that you have requested, specifically items 1, 2, 3, and 6 in your request dated June 26, 2008, are protected under Exemption 5, 5 U.S.C. § 552(b)(5) of the FOIA. This information is being denied due to the deliberative process privilege and attorney work product privilege. Item 7 in your request does not reasonably describe specific documents that can be located in a system of records; therefore a search could not be conducted for this "new information."

As the District Counsel, Jacksonville District U.S. Army Corps of Engineers, I have been delegated the authority to issue denials by the South Atlantic Division Counsel. If you consider my response to be a denial of this request, you have the right to appeal this decision to Army General Counsel. The appeal letter must be addressed to the Army General Counsel and submitted to this office at U.S. Army Corps of Engineers, Jacksonville District, Attention: Office of Counsel (FOIA Officer), 701 San Marco Blvd., Jacksonville, FL 32207 for forwarding. An Appeal must be received within 60 days of the date of this letter. The envelope containing the appeal should bear the notation "Freedom of Information Act Appeal."

If this office can be of further assistance, please contact us at 904-232-2067.

Sincerely,

A handwritten signature in cursive script, appearing to read "Patricia A. Morris", is written over a horizontal line.

Patricia A. Morris

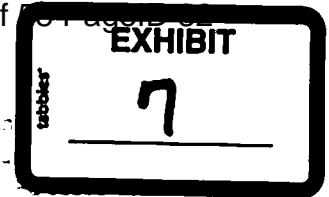


SEP 26 2008

Holland Knight

Tel. 904 353 2000
Fax 904 353 1370

Holland & Knight
80 North LaSalle
Jacksonville, Florida 32202
www.hknlaw.com



Dominic C. MacKenzie
904 798 7303
donny.mackenzie@hklaw.com

Via Overnight Delivery

October 24, 2008

Army General Counsel
U.S. Army Corps of Engineers
Jacksonville District
Attn: Office of Counsel (FOIA Officer)
701 San Marco Boulevard
Jacksonville, FL 32207

Re: FOIA No. 08-141
Ten Mile Creek Project, St. Lucie County, Florida
Request for Documents and Inspection per 5 U.S.C. § 552

FREEDOM OF INFORMATION ACT APPEAL

Dear Sir or Madam:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(6) ("FOIA"), Post, Buckley, Schuh, & Jernigan ("PBS&J"), through its counsel, hereby appeals the September 24, 2008 denial of its request for copies of documents responsive to items 1, 2, 3, 6 and 7 contained in its June 26, 2008 FOIA request, which was a restatement of certain requests contained in PBS&J's March 28, 2008 FOIA request, assigned number 08-141. A copy of the denial letter is attached as **Exhibit A**. Moreover, PBS&J deems the Army Corps of Engineers (the "Corps") to have denied the remaining requests in its June 26, 2008 request, as well as those remaining in its March 28, 2008 request, because of the Corps' extreme delay in producing responsive documents. Therefore, PBS&J hereby appeals the denial of its March 28, 2008 and June 26, 2008 FOIA requests.

Factual Background

PBS&J originally submitted a FOIA request on March 28, 2008. *See Exhibit B*. The request was in response to the Corps' letter dated February 22, 2008 notifying PBS&J of the Corps' intention to pursue an A-E liability action against PBS&J for services provided on the Ten Mile Creek Project. *See Exhibit C*. The Corps' letter identified seven issues allegedly supporting its claim of A-E liability and ultimately stated that the Corps intended to seek damages for more than \$15 million from PBS&J. For the purpose of investigating and evaluating the Corps' claims and preparing its defense, PBS&J requested documents specifically tailored to those seven issues outlined in the Corps' letter.

Army General Counsel
October 24, 2008
Page 2

The Corps' Office of Counsel notified counsel for PBS&J that a response to the March 28, 2008 FOIA request would be forthcoming by April 25, 2008. *See Exhibit D.* Notably, the Corps' letter did not include any assertion of privilege. Notwithstanding the foregoing, in a letter dated May 14, 2008, the Corps informed counsel for PBS&J that the estimated processing cost to respond to the FOIA request would be at least \$53,000.¹ *See Exhibit E.* Apparently, no search for documents had been conducted and PBS&J had not received any documents in response to its March 28, 2008 FOIA request. Again, the Corps' second letter did not assert any privilege.

After several attempts and requests for contact (which went unanswered), PBS&J was finally able to get an audience with the Corps' representative in an effort to obtain the requested discovery. This resulted in an amended request dated June 26, 2008 wherein PBS&J identified key requests for documents to be produced as soon as possible so that PBS&J could proceed with preparing its defense. *See Exhibit F.* Although the Freedom of Information Officer had orally agreed that these items could be easily and readily identified and produced, by letter dated September 24, 2008, the Jacksonville District Counsel denied the request for items 1, 2, 3, 6 and 7 and did not provide documents responsive to the remaining requests.

Notably, no privilege was asserted, much less referenced in such conversation.

Argument

Although FOIA requires an agency to respond to a FOIA request within twenty days, PBS&J has permitted the Corps wide latitude in responding to its FOIA requests with the hope that the agency would ultimately produce the requested documents, especially considering that the Corps is relying on these exact documents to ready a case of A-E liability against PBS&J. However, after nearly seven months with no response from the Corps, PBS&J deems the Corps to have denied any and all outstanding requests and appeals that denial. Additionally, PBS&J appeals the specific denial of items 1, 2, 3, 6 and 7 of the June 26, 2008 request.

The District Counsel cited the fifth exemption of FOIA, § 552(b)(5), as grounds for denying items 1, 2, 3 and 6 of the June 26, 2008 request. She particularly cited the deliberative process privilege and the attorney-work product privilege. Exemption five as a purported basis for the denial is both legally and factually wrong for at least three reasons: (1) the documents were not prepared by a government agency; (2) the documents are not privileged from production in civil discovery because the documents are not attorney work product or deliberative process privileged; and (3) the District Counsel did not properly provide the basis for the application of exemption five to the documents. In addition, the District Counsel violated FOIA by failing to provide reasonably segregable portions of privileged documents. Therefore, the denial was improper and should be reversed with a direction to fulfill PBSJ's request and produce the documents responsive to items 1, 2, 3 and 6.

¹ The estimated processing cost is unreasonably high especially given the fact that the documents and things requested are the basis of the Corps' claims against PBS&J in this matter and undoubtedly have been culled and referenced by the Corps in constructing its claims in this matter. PBS&J responded to the Corps' fee letter on May 23, 2008. *See Exhibit G.*

Army General Counsel
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Item 7 of the June 26, 2008 FOIA request was denied because the request "does not reasonably describe specific documents that can be located in a system of records." The basis of the denial of item 7 is equally improper and should be reversed with a direction to fulfill PBS&J's request and produce the documents responsive to item 7.

Because there was no basis stated for denying the remaining requests in the March 28, 2008 and the June 26, 2008 FOIA requests, the Corps violated FOIA by withholding documents and not timely producing responsive documents. Therefore, the Corps should be directed to fulfill PBS&J's request and produce the documents responsive to all of the FOIA requests.

Denial of items 1, 2, 3 and 6 was not appropriate because the documents requested therein were not prepared by a government agency.

The fifth exemption to FOIA states that disclosure is not required for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." § 552(b)(5). The first requirement to qualify under exemption five of FOIA is that the document's source must be a government agency. *Dep't of the Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). Items 1, 2, 3 and 6 clearly seek documents prepared by experts retained by the Corps but not prepared by Corps employees. To the extent that responsive documents were not prepared by the Corps or another government agency, the responsive documents are not privileged from production under exemption five and should be produced.

Denial of items 1, 2, 3 and 6 was not appropriate because the documents requested therein are not privileged from discovery.

To qualify under exemption five of FOIA, a document must "fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency." *Dep't of the Interior & Bureau of Indian Affairs*, 532 U.S. at 8. The U.S. Supreme Court has held that exemption five incorporates civil discovery privileges normally available to a party. *Id.*; see also *Miccosukee Tribe of Indians of Fla. v. U.S.*, 516 F.3d 1235, 1257 (11th Cir. 2008) (holding that exemption 5 includes statutory and common law privileges, such as the deliberative process privilege, attorney-client privilege and attorney work product privilege).

The documents requested in items 1, 2, 3 and 6 are the basis of the Corps' claims against PBS&J in this matter and, therefore, these documents would most certainly have to be produced by the Corps and/or the government as initial disclosures pursuant to Rule 26 of the Federal Rules of Civil Procedure as well as in response to other discovery requests under the Federal Rules of Civil Procedure. Clearly, the documents responsive to items 1, 2, 3 and 6 are not privileged from production under exemption five and should be produced.

The documents requested in items 1, 2, 3 and 6 are not privileged attorney work product.

Under the attorney-work product privilege of exemption five of FOIA, a government agency is not required to produce documents prepared by an attorney in anticipation of litigation.

Army General Counsel
October 24, 2008
Page 4

Miccosukee Tribe of Indians of Fla., 516 F.3d at 1263. Items 1, 2, 3 and 6 did not request any documents prepared by an attorney in anticipation of litigation, but sought the work product of non-attorney experts whose reports, notes, analyses and other work product is not privileged under the attorney work product privilege. Therefore, the attorney work product privilege is an inadequate basis for the denial of production of the documents responsive to items 1, 2, 3 and 6, and the documents should be produced.

The documents requested in items 1, 2, 3 and 6 are not deliberative process privileged.

The purpose of the deliberative process privilege is to protect an agency's decision-making process from the chilling effect disclosure may have. *Miccosukee Tribe of Indians of Fla.*, 516 F.3d at 1257. For the deliberative process privilege to apply, the material must be pre-decisional. *Id.* The documents requested in items 1, 2, 3 and 6 are not pre-decisional in that they were not prepared to assist an agency decision-maker in arriving at a decision. The documents requested in items 1, 2, 3 and 6 were prepared after the decisions regarding the Ten Mile Creek Project had been made. The requests in question specifically request expert reports and analyses concerning the basis of the foundation of the Corps' conclusions reached as articulated by the Corps' letter dated February 22, 2008, in addition to other expert reports or written analyses concerning the condition of the project in question. Similarly, item 6 simply asks for all documents and materials which support the cost estimates which the Corps has referenced numerous times and has specifically outlined in its letter dated February 22, 2008. The Corps is not permitted to assert claims against PBS&J and then refuse to produce the documents supporting those claims on the basis of a purported discovery privilege.

Moreover, any factual material contained in the documents responsive to items 1, 2, 3 and 6 must be disclosed because factual material is outside the scope of the deliberative process privilege. *Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp.*, 376 F.3d 1270, 1278 (11th Cir. 2004). Therefore, the deliberative process privilege is an inadequate basis for the denial of production of the documents responsive to items 1, 2, 3 and 6, and the documents should be produced.

Denial of the documents requested in items 1, 2, 3 and 6 was not appropriate because the District Counsel did not properly provide the basis for the application of exemption five to those documents.

An agency must provide sufficient information about the reasons for withholding a document for the requestor of information to determine whether there is an adequate factual basis for the alleged privilege. *Miccosukee Tribe of Indians of Fla.*, 516 F.3d at 1258. This is commonly accomplished through a *Vaughn* Index. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Specifically, the *Vaughn* Index should identify the reasons why a particular exemption is relevant and correlate those claims with the particular part of the withheld document to which they apply. *Miccosukee Tribe of Indians of Fla.*, 516 F.3d at 1258. The *Vaughn* Index should consist of a listing of each withheld document, or portion of a document, and should indicate the specific FOIA exemption applicable, and the specific agency justification for the non-disclosure. *Id.* at 1260. As for e-mail communication, the *Vaughn* Index should include a description of each e-mail's author and recipient, and a description of the contents of the e-mail. *Id.*; *St.*

Army General Counsel
October 24, 2008
Page 5

Andrews Park, Inc. v. U.S. Dep't of the Army Corps of Eng'rs, 299 F. Supp. 2d 1264, 1271 (S.D. Fla. 2003).

The District Counsel failed to provide the information normally contained in a *Vaughn* Index in violation of FOIA which should be considered a waiver of any privilege which may apply. Therefore, the District Counsel's denial should be reversed with a direction to fulfill PBS&J's request and produce the documents responsive to items 1, 2, 3 and 6.

Reasonably segregable portions of privileged documents were not produced in violation of FOIA.

FOIA provides that "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." § 552(b); *Miccosukee Tribe of Indians of Fla.*, 516 F.3d at 1257. The Corps failed to do this and instead decided, after months of inexcusable delay, to withhold those documents and materials specifically agreed upon as producible. Therefore, the District Counsel violated FOIA by failing to provide any documents or portions of documents that were not privileged under exemption five of FOIA.

Denial of the requested documents in item 7 was not appropriate.

Item 7 requests "The 'new information' referenced by Dr. Bromwell in the March 12, 2008 meeting of PBS&J, MACTEC and Army Corps of Engineers representatives." This clear and unambiguous request was again the byproduct of a specific conversation wherein the Corps agreed it understood what was being requested. Nevertheless, the request was belatedly denied because the request "does not reasonably describe specific documents that can be located in a system of records." However, everyone involved in this case knows that Dr. Bromwell is involved as an expert originally retained by the South Florida Water Management District who later appeared on behalf of the Corps at a meeting in this matter. It does not take numerous persons or much time to identify and copy Dr. Bromwell's work product and such work product should have been produced without delay. The quickest and easiest manner of searching for responsive documents would be to contact Dr. Bromwell and ask him what documents he was referencing during the March 12, 2008 meeting. As such, the Corps' response is merely indicative of its decision to stonewall and obstruct PBS&J's rights.

PBS&J appeals the denial of the remaining items requested in the March 28, 2008 and June 26, 2008 FOIA requests.

PBS&J deems the Corps to have denied the other items requested in the March 28, 2008 and June 26, 2008 FOIA requests because of the inordinate delay in providing documents responsive to these requests. PBS&J originally filed its FOIA request on March 28, 2008. Under FOIA, the Corps had twenty days in which to respond and produce responsive documents. However, as of October 20, 2008, PBS&J has only received a handful of documents in response to its request.

Army General Counsel
October 24, 2008
Page 6

Moreover, on June 26, 2008, PBS&J notified the Corps that particular items in its March 28, 2008 FOIA request were of particular significance and should be produced immediately. Although the Corps indicated that the documents would be produced quickly, instead, the Corps delayed responding until September 24, 2008 at which time the Corps merely denied several of the requests and remained silent on the others.

The Corps' repeated failure to meet the timelines contained in the statute is adverse in nature to PBS&J and, therefore, PBS&J deems the Corps to have denied the remaining requests contained in the March 28, 2008 and June 26, 2008 FOIA requests. 32 C.F.R. § 518.17(a). There being no adequate basis for the denial of production of the documents responsive to the remaining items in the March 28, 2008 and June 26, 2008 FOIA requests, the documents should be produced.


Conclusion

The Corps has the burden of proving that the basis of the denial is proper. *Miccosukee Tribe of Indians of Fla.*, 516 F.3d at 1258; *Moye, O'Brien, O'Rourke, Hogan & Pickert*, 376 F.3d at 1277. As shown above, the District Counsel has failed to carry this burden. The District Counsel has provided no justifiable basis to deny PBS&J's request for the documents in items 1, 2, 3, 6 and 7 of the June 26, 2008 request. Moreover, the Corps has inordinately delayed producing documents responsive to the remaining requests in PBS&J's March 28, 2008 and June 26, 2008 requests and has provided no *Vaughn* index nor produced reasonably segregable portions of the materials requested which are not exempt from production. Therefore, the denials were improper and should be reversed with a direction to fulfill PBS&J's requests and produce the requested documents within the time period provided by FOIA. PBS&J invokes every right and objection it has to the Corps' conduct and actions in this matter and further reserves all of its rights relating to recourse accordingly.

Thank you for your coordination.

Very truly yours,

HOLLAND & KNIGHT LLP



Dominic C. MacKenzie

Enc.

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REPLY TO
ATTENTION OF:

DEPARTMENT OF THE ARMY

JACKSONVILLE DISTRICT CORPS OF ENGINEERS
P.O. BOX 4970
JACKSONVILLE, FLORIDA 32232-0019

Office of Counsel

SEP 24 2008

Attention: Mr. Dominic C. MacKenzie
Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville FL 32202-3622

Dear Mr. MacKenzie:

This letter is in response to your Freedom of Information Act (FOIA) request received by our office on March 28, 2008, and assigned number 08-141. You requested documents related to the Ten Mile Creek Project, St. Lucie County, Florida. You have received two partial releases and as previously discussed, our office continues to review and collect other documents that are responsive to your request. Please find enclosed the "Final Draft Report on Technical Evaluation of Ten Mile Creek Reservoir, St. Lucie County, Florida."

It is the policy of the Department of the Army to release the maximum amount of information under the FOIA, unless the information is exempt from release and a significant reason exists for non-disclosure. Some of the records that you have requested, specifically items 1, 2, 3, and 6 in your request dated June 26, 2008, are protected under Exemption 5, 5 U.S.C. § 552(b)(5) of the FOIA. This information is being denied due to the deliberative process privilege and attorney work product privilege. Item 7 in your request does not reasonably describe specific documents that can be located in a system of records; therefore a search could not be conducted for this "new information."

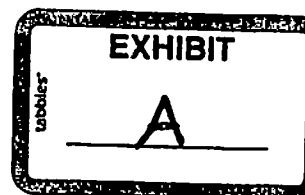
As the District Counsel, Jacksonville District U.S. Army Corps of Engineers, I have been delegated the authority to issue denials by the South Atlantic Division Counsel. If you consider my response to be a denial of this request, you have the right to appeal this decision to Army General Counsel. The appeal letter must be addressed to the Army General Counsel and submitted to this office at U.S. Army Corps of Engineers, Jacksonville District, Attention: Office of Counsel (FOIA Officer), 701 San Marco Blvd., Jacksonville, FL 32207 for forwarding. An Appeal must be received within 60 days of the date of this letter. The envelope containing the appeal should bear the notation "Freedom of Information Act Appeal."

If this office can be of further assistance, please contact us at 904-232-2067.

Sincerely,

A handwritten signature in cursive script, reading "Patricia A. Morris".

Patricia A. Morris



SEP 26 2008

Holland+Knight

Tel 904 353 2000
Fax 904 358 1872

Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville, FL 32202-3622
www.hklaw.com

March 25, 2008

DOMINIC C. MACKENZIE
904-798-7303
InternetAddress:
donny.mackenzie@hklaw.com

PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

Ms. Michelle Wolfe
Office of Counsel
U.S. Army Corps of Engineers
Jacksonville District
701 San Marco Blvd.
Jacksonville, FL 32207

Re: Ten Mile Creek Project, St. Lucie County, Florida
Request for Documents and Inspection per 5 U.S.C. § 552 ("FOIA").

Dear Ms. Wolfe:

Having not heard from you yesterday, and based on our conversation Monday afternoon wherein you informed me your superiors had instructed you staff up the case and ready it for filing, I assume the Corps is not interested in entering into a tolling agreement. As such, Post, Buckley, Schuh & Jernigan respectfully requests that it be provided the various documents, materials and things it has requested throughout this matter. Specifically, it requests that it be provided copies or access to the following:

1. All documents, materials and things which the Department of The Army, Jacksonville District Corps of Engineers (The "Corps of Engineers") contends support its claims against Post, Buckley, Schuh and Jernigan, Inc. and/or Mactec Engineering and Consulting, Inc. for Architect-Engineer (A-E) liability arising under Contract No. DACW17-9-D-0051, dated October 5, 1999, including, without limitation, Task Orders No. 4, 7, and 9 (the "Contract") in connection with the Ten Mile Creek Project, St. Lucie County, Florida ("the Project"); more particularly described in Contracting Officer Griselle Gonzalez's letter to Elliott L. Grosh dated February 22, 2008. A copy of said letter is attached hereto as Exhibit A for specific and quick reference.
2. Any and all expert reports prepared by or on behalf of the Corps of Engineers in connection with its claims against Post,



Buckley, Schuh and Jernigan, Inc. and/or Mactec Engineering and Consulting, Inc. for Architect-Engineer (A-E) liability arising under the Contract.

3. Any and all reports along with supplements, exhibits, tabulations, calculations, worksheets, and/or attachments prepared by or for the Corps of Engineers in connection with the Project.
4. Any and all photographs, drawings, depictions, maps, models, motion pictures, videotapes, DVD's, CDs, or plats pertaining to any fact or issue involved in the claims asserted by the Corps against Post, Buckley, Schuh and Jernigan, Inc. and/or Mactec Engineering and Consulting, Inc. for Architect-Engineer (A-E) liability arising under the Contract.
5. Any and all photographs, drawings, depictions, maps, models, motion pictures, videotapes, DVD's, CDs, or plats depicting the condition of the Project for which the Corps of Engineers is either concerned or asserts a claim in connection with the Project.
6. Any and all agreements entered into by the Corps of Engineers with anyone in connection with the Project.
7. All field data including Piezometer readings collected and/or recorded in connection with the Project.
8. All cost estimates, invoices, proof of payments, calculations, tabulations and backup documentation prepared, reviewed, referred to, used or relied upon by the Corps of Engineers in arriving at the damages and costs estimates reflected in Enclosure 1 of Contracting Officer Griselle Gonzalez's letter to Elliott L. Grosh dated February 22, 2008.
9. Any and all documentation and/or expert reports explaining and detailing the Corps of Engineering's findings or assertions relating to its claims asserted in connection with the Project, including but not limited to all documents, materials and things the Corps of Engineers relies upon to determine the Project's seepage system will not function as intended.
10. All documents, materials and things reflecting design or redesign of the soil cement system for the Project including but not limited to specific soil-cement formulas and calculations relating to the soil-cement's resistance to uplift for all designs implemented by the Corps of Engineers.

11. Any and all documents, materials and things including photographs and/or videotapes, DVDs or CDs evidencing seepage occurring into Canal 95 or any other waterway or tributary connected to the Project.
12. All Progress Meeting notes and minutes in the possession of the Corps of Engineers relating to the Project.

In addition, PBS&J respectfully requests that it be granted access to view and inspect the premises and project in question.

To the extent necessary, please consider this request as one brought under the Freedom of Information Act, as amended, 5 U.S.C. § 552 ("FOIA"). If the Corps of Engineers claims an exemption for any requested records or portions of requested records, FOIA requires that the Corps of Engineers provide all reasonably segregable, non-exempt portions of such records, together with a detailed list and descriptions of the records or portions thereof for which the Corps of Engineers claims an exemption and a discussion of the reasoning supporting the claimed exemption. To the extent that documents are located before the entire FOIA search is complete, we request that the Corps of Engineers provide a partial response to our request as information becomes available.

Holland & Knight will reimburse the Corps of Engineers for the reasonable costs of producing the requested records provided that such costs do not exceed \$1,000. If the Corps of Engineers expects such costs to exceed \$1,000, please contact me for further instructions.

Sincerely,

HOLLAND & KNIGHT LLP



Dominic C. MacKenzie

DCM:ast
Enclosures

cc: Becky Schaffer, Esq. (w/enclosures)
Elliot Grosh (w/enclosures)
Broughton Lang (w/enclosures)



REPLY TO
ATTENTION CP

DEPARTMENT OF THE ARMY
JACKSONVILLE DISTRICT CORPS OF ENGINEERS
P.O. BOX 4970
JACKSONVILLE, FLORIDA 32232-0019

February 22, 2008

Contracting Division

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Elliot t L. Grosh, P.E. BCCE
Senior Vice President
Mr. Avinash Gupta, P.E.
Senior Vice President
Mr. Eugene H. Yerkes, AICP, P.E.
Program Manager
Post, Buckley, Schuh & Jernigan, Inc.
7785 Baymeadows Way, Suite 202
Jacksonville, Florida 32256

RE: A-E Liability under Contract No. DACW17-99-D-0051, Task Orders No. 4, 7, and 9, for the Ten Mile Creek Project, St Lucie County, Florida.

Dear Messrs. Grosh, Gupta and Yerkes:

In accordance with the provisions of FAR 52.236-23, Responsibility of the A-E Contractor, you are hereby notified that the Corps of Engineers, Jacksonville District, intends to pursue an A-E liability action against Post, Buckley, Schuh & Jernigan, Inc. (PBS&J) related to the services provided under Contract No. DACW17-99-D-0051, Task Orders No. 4, 7, and 9, for the Ten Mile Creek Project, St. Lucie County, Florida. PBS&J had been previously notified of errors and omissions in their design of the Ten Mile Creek Project in our letters dated October 22, 2007, November 13, 2007, November 21, 2007, December 21, 2007, January 29, 2008, February 15, 2008, and February 20, 2008.

The seven issues which have been identified as involving A-E liability are as follows:

1) Seepage Management. Sufficient engineering analysis was not performed to address seepage and slope stability issues. A review of project site geology indicates highly variable subsurface conditions which were inadequately

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represented by PBS&J in only one generalized cross-section for design purposes. Additionally, other site features such as the adjacent canals and Ten Mile Creek were not included as part of the analysis, resulting in an inadequate blanket drain system and the omission of other seepage control measures.

2) Soil-cement Apron Stability against Uplift. The design does not adequately address the stability of the soil-cement apron when subjected to uplift pressure during rapid drawdown conditions which may adversely affect the integrity of the soil-cement. This is a design deficiency and mitigation measures may be required to assure the integrity of the soil-cement apron.

3) Erosion at the Base of the Soil-cement Apron. The design does not adequately address the potential for soil erosion at the terminus of the soil-cement apron along the interior toe of the embankment. For reservoir pool elevations lower than EL 18 NGVD 29, storm-water runoff from the soil-cement armoring can cause soil erosion sufficient to undermine the apron and, if not addressed, ultimately endanger embankment stability. For reservoir pool elevations near EL 18 NGVD 29, wind-driven waves can have a similar effect. This is a design deficiency and some means of erosion control should have been provided.

4) Erosion of the Downstream Side Slope due to Crest Slope. Erosion of the exterior embankment is caused due to the lack of slope on the crest of the embankment, which directs runoff from the crest down the unprotected exterior face of the embankment, rather than down the interior face, which is protected by the soil-cement apron. A reasonable designer would have shown a slope toward the protected interior face to provide proper drainage.

5) Erosion at the discharge of the STA into Canal 96. Discharge of the STA into Canal 96 is through the STA outlet structure, S-384, which includes a 5 ft x 7 ft single barrel concrete box culvert oriented perpendicular to the canal bank opposite the discharge point. The discharge velocity of the water is such that excessive erosion of the opposite bank takes place and the design did not include an adequate protective measure. This problem was recognized by SFWMD during field inspections and SFWMD independently contracted for placement of riprap upstream and downstream of the discharge point to alleviate this problem.

-3-

6) Survey Issues. In April 2004 Con-Ops field personnel notified Engineering Division of conflicts on the design drawings concerning survey coordinates for the location of Pump Station 382. The construction contractor had three different options to determine coordinates for the pump station from the design documents and two of those three contained incorrect information. After the issue was resolved and construction was allowed to continue on the pump station, the A-E Liability Board met to discuss possible liability actions and recommended that A-E liability be pursued. The Contracting Officer sent a letter to PBS&J on 3 August 2005 stating that the amount of damages to the Government totaled \$113,782 and PBS&J counter-offered \$16,309.98 on 18 August 2005. On 28 March 2006 the Board met and recommended a final offer of \$76,844.68 to the Contracting Officer, based on the cost per day during the time the contractor was under a stop-work order, for transmittal to PBS&J. This issue remains unresolved.

7) Pump Station 382 Wall Dimensions. There were discrepancies between two drawings on the dimensions for a wall in Pump Station 382. As a result of these discrepancies, reinforcing steel that was too short was procured for the wall. The contractor was able to reuse some of the incorrectly-sized reinforcing; however, a mod to the contract resulted in a net cost of \$15,535 being incurred by the Government for rework of the reinforcing steel to the correct size.

A detailed statement of the estimated damages to the Government is shown in Enclosure 1. The damages presented are an initial assessment and will be revised as needed. As the investigation of liability and negotiations proceed, the damages can be updated or revised to reflect the latest findings and circumstances. The damages are categorized as construction costs, ancillary costs and investigation, and recovery costs. These costs are the extra costs that the Government has incurred or anticipates incurring in the future due to the A-E firm's design errors or omissions. The construction costs include those costs in a construction change that would not have been included in the construction contract price had the design been correct. This is in accordance with Engineer FAR Supplement (EFARS) 36.601-3(S-101) and the guidance and procedures in EP 715-1-7, Architect-Engineering Contracting.

The construction cost damages are based either on contract modifications that have been executed or on anticipated corrective actions needed to remedy the design errors. They are corrective actions that are needed due to the negligent design

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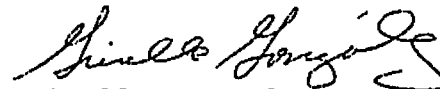
by the A-E. The corrective actions are required for the project to operate safely and meet the authorized intent.

The following is the summary of damages assigned to PBS&J:

Construction Costs	\$ 11,323,786.02
Ancillary Costs	2,259,000.00
Investigation and Recovery Costs	<u>2,116,073.64</u>
 TOTAL COST	 \$15,698,859.66

You are requested to respond to this letter within seven calendar days of the date of this letter, stating the intended course of action of Post, Buckley, Schuh & Jernigan, Inc., to resolve this matter and your availability for a meeting to begin negotiations on our respective positions. Your response should be addressed to the undersigned.

Sincerely,



Griselle Gonzalez
Contracting Officer

Encl

Enclosure 1



REPLY TO
ATTENTION CP

DEPARTMENT OF THE ARMY
JACKSONVILLE DISTRICT CORPS OF ENGINEERS
P.O. BOX 4970
JACKSONVILLE, FLORIDA 32232-0019

February 22, 2008

Contracting Division

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Elliott L. Grosh, P.E. BCEE
Senior Vice President
Mr. Avinash Gupta, P.E.
Senior Vice President
Mr. Eugene H. Yerkes, AICP, P.E.
Program Manager
Post, Buckley, Schuh & Jernigan, Inc.
7785 Baymeadows Way, Suite 202
Jacksonville, Florida 32256

RE: A-E Liability under Contract No. DACW17-99-D-0051, Task Orders No. 4, 7, and 9, for the Ten Mile Creek Project, St Lucie County, Florida.

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The seven issues which have been identified as involving A-E liability are as follows:

1) Seepage Management. Sufficient engineering analysis was not performed to address seepage and slope stability issues. A review of project site geology indicates highly variable subsurface conditions which were inadequately

EXHIBIT

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-2-

represented by PBS&J in only one generalized cross-section for design purposes. Additionally, other site features such as the adjacent canals and Ten Mile Creek were not included as part of the analysis, resulting in an inadequate blanket drain system and the omission of other seepage control measures.

2) Soil-cement Apron Stability against Uplift. The design does not adequately address the stability of the soil-cement apron when subjected to uplift pressure during rapid drawdown conditions which may adversely affect the integrity of the soil-cement. This is a design deficiency and mitigation measures may be required to assure the integrity of the soil-cement apron.

3) Erosion at the Base of the Soil-cement Apron. The design does not adequately address the potential for soil erosion at the terminus of the soil-cement apron along the interior toe of the embankment. For reservoir pool elevations lower than EL 18 NGVD 29, storm-water runoff from the soil-cement armoring can cause soil erosion sufficient to undermine the apron and, if not addressed, ultimately endanger embankment stability. For reservoir pool elevations near EL 18 NGVD 29, wind-driven waves can have a similar effect. This is a design deficiency and some means of erosion control should have been provided.

4) Erosion of the Downstream Side Slope due to Crest Slope. Erosion of the exterior embankment is caused due to the lack of slope on the crest of the embankment, which directs runoff from the crest down the unprotected exterior face of the embankment, rather than down the interior face, which is protected by the soil-cement apron. A reasonable designer would have shown a slope toward the protected interior face to provide proper drainage.

5) Erosion at the discharge of the STA into Canal 96. Discharge of the STA into Canal 96 is through the STA outlet structure, S-384, which includes a 5 ft x 7 ft single barrel concrete box culvert oriented perpendicular to the canal bank opposite the discharge point. The discharge velocity of the water is such that excessive erosion of the opposite bank takes place and the design did not include an adequate protective measure. This problem was recognized by SFWMD during field inspections and SFWMD independently contracted for placement of riprap upstream and downstream of the discharge point to alleviate this problem.

-3-

6) Survey Issues. In April 2004 Con-Ops field personnel notified Engineering Division of conflicts on the design drawings concerning survey coordinates for the location of Pump Station 382. The construction contractor had three different options to determine coordinates for the pump station from the design documents and two of those three contained incorrect information. After the issue was resolved and construction was allowed to continue on the pump station, the A-E Liability Board met to discuss possible liability actions and recommended that A-E liability be pursued. The Contracting Officer sent a letter to PBS&J on 3 August 2005 stating that the amount of damages to the Government totaled \$113,782 and PBS&J counter-offered \$16,309.98 on 18 August 2005. On 28 March 2006 the Board met and recommended a final offer of \$76,844.68 to the Contracting Officer, based on the cost per day during the time the contractor was under a stop-work order, for transmittal to PBS&J. This issue remains unresolved.

7) Pump Station 382 Wall Dimensions. There were discrepancies between two drawings on the dimensions for a wall in Pump Station 382. As a result of these discrepancies, reinforcing steel that was too short was procured for the wall. The contractor was able to reuse some of the incorrectly-sized reinforcing; however, a mod to the contract resulted in a net cost of \$15,535 being incurred by the Government for rework of the reinforcing steel to the correct size.

A detailed statement of the estimated damages to the Government is shown in Enclosure 1. The damages presented are an initial assessment and will be revised as needed. As the investigation of liability and negotiations proceed, the damages can be updated or revised to reflect the latest findings and circumstances. The damages are categorized as construction costs, ancillary costs and investigation, and recovery costs. These costs are the extra costs that the Government has incurred or anticipates incurring in the future due to the A-E firm's design errors or omissions. The construction costs include those costs in a construction change that would not have been included in the construction contract price had the design been correct. This is in accordance with Engineer FAR Supplement (EFARS) 36.601-3(S-101) and the guidance and procedures in EP 715-1-7, Architect-Engineering Contracting.

The construction cost damages are based either on contract modifications that have been executed or on anticipated corrective actions needed to remedy the design errors. They are corrective actions that are needed due to the negligent design

-4-

by the A-E. The corrective actions are required for the project to operate safely and meet the authorized intent.

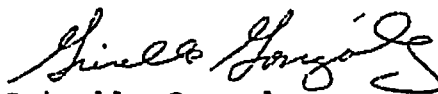
The following is the summary of damages assigned to PBS&J:

Construction Costs	\$ 11,323,786.02
Ancillary Costs	2,259,000.00
Investigation and Recovery Costs	<u>2,116,073.64</u>

TOTAL COST	\$15,698,859.66
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You are requested to respond to this letter within seven calendar days of the date of this letter, stating the intended course of action of Post, Buckley, Schuh & Jernigan, Inc., to resolve this matter and your availability for a meeting to begin negotiations on our respective positions. Your response should be addressed to the undersigned.

Sincerely,



Griselle Gonzalez
Contracting Officer

Encl



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY

JACKSONVILLE DISTRICT CORPS OF ENGINEERS
P.O. BOX 4970
JACKSONVILLE, FLORIDA 32232-4970

April 7, 2008

Office of Counsel

Attention: Mr. Dominic C. MacKenzie
Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville FL 32202-3622


Dear Mr. MacKenzie:

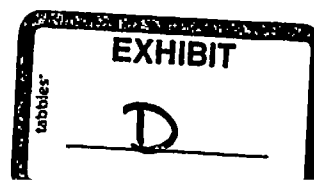
This letter acknowledges receipt of your Freedom of Information Act (FOIA) request received by our office on March 28, 2008, and assigned FOIA No. 08-141 concerning the Ten Mile Creek Project, St. Lucie County, Florida. Your request will be processed under regulations and guidance set forth under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (b) and Army Regulation 25-55.

Under the FOIA we are required to provide a response to you within 20 working days after receiving a request. Therefore, as a rough estimate, you should expect a response from our office by April 25, 2008.

If this office can be of further assistance, please contact us at 904-232-2067.

Sincerely,


Denise Patterson Sturgeon
Paralegal Specialist





REPLY TO
ATTENTION OF:

DEPARTMENT OF THE ARMY

JACKSONVILLE DISTRICT CORPS OF ENGINEERS
P.O. BOX 4970
JACKSONVILLE, FLORIDA 32232-0019

May 14, 2008

Office of Counsel

Attention: Mr. Dominic C. MacKenzie
Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville FL 32202-3622

Dear Mr. MacKenzie:

This letter is in reference to your Freedom of Information Act (FOIA) request received by our office on March 28, 2008, and assigned FOIA No. 08-141 concerning the Ten Mile Creek Project, St. Lucie County, Florida. You are advised that there will be fees associated with processing your FOIA request. As a commercial requester, you will be charged for search, review and duplication fees. Because the scope of the records you requested is so vast, your FOIA request is estimated to exceed the amount of \$250.00 for processing. You are encouraged to narrow your request by identifying specific documents for access or reproduction.

To memorialize our telephone conversation on May 12, 2008, I informed you that estimated processing costs to respond to your FOIA request would be \$53,000+. The processing of your request involves electronic and physical hand searches for responsive documents and review by approximately 50 professional grade Corps employees, as well as clerical time and duplication costs. For your information, basic costs for searching and reproducing are as follows: clerical searching is charged at \$20.00 per hour and professional search and review is charged at \$44.00 per hour. There is a charge of 25 cents for microfiche and 15 cents per page for copying with a minimum charge of \$15.00. Audiovisual materials are \$6.25 per copy based on the size of each document. Please advise whether you would like to narrow your request.

Also, Items 1, 4 and 5 of your request seek a legal conclusion and do not provide a reasonable description of documents in a system of records. As defined by the Department of Justice, the key factor is the ability of an agency's staff to reasonably ascertain exactly which records are being requested and then locate them. Please rephrase these requests and reasonably describe the records sought.

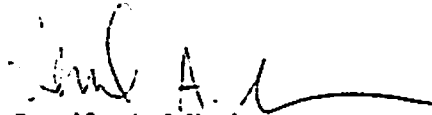
You are required to pay the minimum amount of \$250.00 before we can mail the requested documents to you. You will be notified of the total amount due when the records are assembled. Your check should be made payable to the Finance Officer and mailed to my attention at the address above. Please acknowledge that you are willing to pay the minimum \$250.00 and the final amount after the records are assembled. If you wish to narrow your request, please send your amended request to my attention at the address above. Your response should be received in this office within thirty days of today's date or your request will be considered withdrawn. Please direct any correspondence regarding your FOIA request to my



MAY 16 2008

attention. If this office can be of further assistance, please contact us at 904-232-1737 or 904-232-2067.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer A. Misciagna", with a long horizontal flourish extending to the right.

Jennifer A. Misciagna
Freedom of Information Officer

Holland Knight

Tel. 904-333-0000
Fax 904-333-0370

Holland Knight LLP
60 North Laura Street, Suite 2400
Jacksonville, FL 32202-3400
www.hklaw.com

DOMINIC C. MACKENZIE
904-798-7303
InternetAddress:
donny.mackenzie@hklaw.com

June 26, 2008

PRIVILEGED AND CONFIDENTIAL

VIA FACSIMILE 904-232-1141

Ms. Jennifer Misciagna
Freedom of Information Officer
U.S. Army Corps of Engineers
Jacksonville District
P.O. Box 4970
Jacksonville, FL 32232-0019

Re: Army Corps of Engineers/Post, Buckley, Schuh & Jernigan
Ten Mile Creek Project, St. Lucie County, Florida

Dear Ms. Misciagna:

This confirms our telephone conference on June 24, 2008 wherein we discussed my client's outstanding Freedom of Information Act request and its status. To reiterate our conference, Post, Buckley, Schuh & Jernigan reminds the Corps of its obligation to provide a partial response to our request as information becomes available to the extent the documents are located before the entire FOIA search is complete. Putting off the issue of the scope of the entire request and the apparent effort required for you to fully comply, we have identified the following items and PBS&J requests that they be produced as soon as possible:

1. Expert reports and analysis concerning the basis of the Corps' claims against PBS&J in this matter as they relate to liability and damages;
2. Dr. Bromwell's work product prepared for or on behalf of the Army Corps of Engineers as it relates to the Ten Mile Creek Project;
3. The work product of any other expert witness retained by or on behalf of the Army Corps of Engineers regarding such persons' analysis of the Ten Mile Creek Project;
4. All materials referenced or relied upon by Ms. Gonzalez in her letter to PBS&J dated February 22, 2008;



June 26, 2008

Page 2

5. All materials referenced by Ms. Gonzalez in her letter dated March 28, 2008;
6. All cost estimates prepared by or on behalf of the Army Corps of Engineers relating to the alleged costs to repair and/or remediate the project in question as specifically referenced in Ms. Gonzalez' March 28, 2008 letter;
7. The "new information" referenced by Dr. Bromwell in the March 12, 2008 meeting of PBS&J, MACTEC and Army Corps of Engineers representatives;
8. All photographs and pictures taken by or on behalf of the Army Corps of Engineers regarding the specific claims asserted by the Army Corps of Engineers against Post, Buckley, Schuh & Jernigan in this matter; and
9. All monitoring data (i.e. piezometer readings) collected by or on behalf of the Army Corps of Engineers for the project in question from January 1, 2005 to the present.

We have informally agreed that these items can be easily and readily identified and produced. As indicated, PBS&J has agreed to pay the reasonable cost of reproducing the requested documents and things and has indicated several times in the past that it is willing to pay up to \$1,000 for the documents in question. Given the discreet listing of items indicated herein, it is reasonably anticipated that the cost for producing the documents identified within this letter will not exceed \$1,000.

We will address your concerns and the other items specifically requested in my client's Freedom of Information Act at a later time. In the interim, however, we appreciate your efforts in facilitating the production of these materials without further delay. Please call if you have any questions.

Sincerely,

HOLLAND & KNIGHT LLP

Signed in Mr. MacKenzie's absence
in order to avoid delay

Dominic C. MacKenzie

DCM/ast

cc: Becky Schaffer, Esq.

Holland+Knight

Tel 904 353 2000
Fax 904 358 1872

Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville, FL 32202-3622
www.hklaw.com

DOMINIC C. MACKENZIE
904-798-7303
InternetAddress:
donny.mackenzie@hklaw.com

May 23, 2008

PRIVILEGED AND CONFIDENTIAL

Ms. Jennifer Misciagna
Freedom of Information Officer
U.S. Army Corps of Engineers
Jacksonville District
P.O. Box 4970
Jacksonville, FL 32232-0019

Re: Army Corps of Engineers/Post, Buckley, Schuh & Jernigan
Ten Mile Creek Project, St. Lucie County, Florida

Dear Ms. Misciagna :

I have carefully reviewed my client's previous Freedom of Information Act (FOIA) request in light of our previous telephone conversation and your letter dated May 14, 2008. After contemplation, research, and review, I respectfully assert that notwithstanding the tardiness of the response, the Corps' position with respect to PBS&J's FOIA request is unreasonable and in violation of the spirit and intent of the Act.

While I appreciate the gesture to cooperate and the request to revise our request, a simple review of the request reveals that the documents and things requested are discreet documents which are easily identifiable by anyone who is principally involved in this matter without having to enlist the services of fifty government employees to do so. As you may know, this matter is governed by distinct time periods and it appears to me that the Corps' delay in retrieving and producing the documents in question is either designed to attempt to or will effectively prejudice my client's ability to seek timely redress in all available forums. In addition, the documents and things requested are the basis of the Corps' claims against my client in this matter and therefore undoubtedly have been culled and referenced by the Corps in constructing its claim in this matter. Moreover, these documents will most certainly have to be produced by the Corps and/or the government as initial disclosures pursuant to Rule 26 of the federal rules of civil procedure if and when this matter progresses to litigation. Rule 26 initial disclosures are usually without charge.



May 23, 2008
Page 2

Notwithstanding, the request in question specifically requests expert reports and analyses concerning the basis of the foundation of the Corps' conclusions reached as articulated by Ms. Gonzalez' letter dated February 22, 2008 (which she reiterated and expanded upon in her letter dated March 28, 2008). In short, whatever Ms. Gonzalez referred to or relied upon in her letter dated February 22, 2008 to Elliot Grosh has been requested. As indicated above, Ms. Gonzalez presumably referenced such materials and things again in her letter dated March 28. These materials and things can be easily ascertained by Ms. Gonzalez without delay and, quite frankly, should have been produced long ago.

Regarding request # 2, everyone involved in this case knows that Dr. Bromwell is involved as an expert originally retained by the South Florida Water Management District who later appeared on behalf of the Army Corps of Engineers at a meeting in this matter. It does not take numerous persons or much time to identify and copy Dr. Bromwell's work product and such work product should have been produced without delay at least thirty days ago.

Similarly, if there are other experts who have provided reports or prepared written analyses concerning the condition of the project in question, such documents are presumably located in a specified location which can easily be retrieved without delay or excuse and should have been produced by now.

Similarly, my request simply asks for all documents and materials which support the costs estimates which the Corps has referenced numerous times and has been specifically outlined and referenced in Ms. Gonzalez' letters. Again, these documents are discreet documents presumably prepared by one or two individuals and are located in a specific area. It is curious that Ms. Gonzalez could either reference or quote the documents in support of her letters. Clearly fifty government employees and 1,000 hours were not necessary for Ms. Gonzalez to review such materials. These documents were presumably available to Ms. Gonzalez who, at the very least, should know where such are located.

Please remember my client specifically requested, "to the extent that documents are located before the entire FOIA search is complete, we request that the Corps of Engineers provide a partial response to our request as information becomes available."

With that said, it is inconceivable to me how Dr. Bromwell's report materials along with any other expert report materials could not have been produced to date. Moreover, the materials referenced by Ms. Gonzalez and all cost estimates referenced by representatives of the Corps during the

May 23, 2008
Page 3

meeting on March 12, 2008 should not have mysteriously disappeared or found their way into various locations escaping the detection of the very persons who either prepared, compiled or referenced them. In addition, photographs, agreements, reports, videotapes, DVDs and all other items requested are easily identifiable and should be produced without further delay.

Moreover, the reproduction of the documents and things requested should not exceed \$250. PBS&J previously indicated in its initial request that it was willing to pay up to \$1,000 for the documents in question. Boilerplate language asking for an acknowledgement that PBS&J will pay the minimum \$250 is therefore unnecessary. PBS&J nevertheless continues in its willingness and commitment to pay this amount and demands that such documents be produced without further delay. It also agrees to pay the reasonable cost of producing the requested documents and things, but strenuously objects to your \$53,000+ estimate as totally unreasonable under the circumstances.

Given the time that has elapsed, the deadlines imposed by applicable federal law, and the urgent nature of PBS&J's request - and as an accommodation to the Corps - Item # 12 of the request is withdrawn at this time. Please contact me immediately and let me know how the Corps intends to proceed so that we may proceed accordingly thereafter.

Sincerely,

HOLLAND & KNIGHT LLP



Dominic C. MacKenzie

DCM/ast
cc: Becky Schaffer, Esq.

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REPLY TO
ATTENTION OF:

DEPARTMENT OF THE ARMY

JACKSONVILLE DISTRICT CORPS OF ENGINEERS
P.O. BOX 4970
JACKSONVILLE, FLORIDA 32232-0019

Office of Counsel

NOV 10 2008

Attention: Mr. Dominic C. MacKenzie
Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville FL 32202-3622

Dear Mr. MacKenzie:

This letter is in response to your Freedom of Information Act (FOIA) request received by our office on March 28, 2008, and assigned number 08-141. You requested documents related to the Ten Mile Creek Project, St. Lucie County, Florida. Please find enclosed a final release of documents that are responsive to your request.

It is the policy of the Department of the Army to release the maximum amount of information under the FOIA, unless the information is exempt from release and a significant reason exists for non-disclosure. Some of the records that you have requested are protected under Exemption 5, 5 U.S.C. § 552(b)(5) of the FOIA. This information is being denied due to the deliberative process privilege and attorney client privilege. The documents have been clearly marked to indicate what is being withheld. Other records that have been "marked out" or "excised" are protected under Exemption 6 of the FOIA, 5 U.S.C. 552(b)(6). The names and electronic mail addresses have been redacted to protect the privacy of Department of Defense personnel that are referenced.

As the District Counsel, Jacksonville District U.S. Army Corps of Engineers, I have been delegated the authority to issue denials by the South Atlantic Division Counsel. If you consider my response to be a denial of this request, you have the right to appeal this decision to Army General Counsel. The appeal letter must be addressed to the Army General Counsel and submitted to this office at U.S. Army Corps of Engineers, Jacksonville District, Attention: Office of Counsel (FOIA Officer), 701 San Marco Blvd., Jacksonville, FL 32207 for forwarding. An Appeal must be received within 60 days of the date of this letter. The envelope containing the appeal should bear the notation "Freedom of Information Act Appeal."

Additionally, we are compiling appeal packages in response to your appeals of FOIAs 08-141 and 08-263 and will be sending them to the Army General Counsel Office.

If this office can be of further assistance, please contact us at 904-232-2067.

Sincerely,

A handwritten signature in cursive script, reading "Ash Morris", is written over the typed name.

Patricia A. Morris
District Counsel



NOV 13 2008

Holland+Knight

Tel 904 353 2000
Fax 904 358 1872

Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville, FL 32202-3622
www.hklaw.com

August 6, 2008

DOMINIC C. MACKENZIE
904-798-7303
InternetAddress:
donny.mackenzie@hklaw.com

PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

VIA FACSIMILE 904-232-1141

Ms. Jennifer Misciagna
Freedom of Information Officer
U.S. Army Corps of Engineers
Jacksonville District
701 San Marco Blvd.
Jacksonville, FL 32207

Re: Ten Mile Creek Project, St. Lucie County, Florida
Request for Documents and Inspection per 5 U.S.C. § 552 ("FOIA")

Dear Ms. Misciagna:

Post, Buckley, Schuh, & Jernigan respectfully requests that it be provided a true and correct copy of all written notes, memoranda, or reports prepared by Arcadis and/or Arcadis U.S., Inc. ("Arcadis") relating to Arcadis' work, review, and/or analysis of the Ten Mile Creek project specifically including, but not limited to all reports concerning seepage into Ten Mile Creek from the reservoir.

In addition, PBS&J reiterates its recent request that it be granted access to review and inspect the premises and project in question. When we last communicated, you indicated that dates for such inspection would be forthcoming. To facilitate this matter, the following dates are amenable to my clients and its expert witness consultants for the inspection:

August 23, 24, 25, 26, 27, 29, 30 and 31.

September 1, 2, 3, 8, 9, 10, 12, 16, 17, 18, 19, 22, 23, 24, 25 and 26.

Please let me know as soon as possible when this inspection may occur.

To the extent necessary, please consider this request as one brought under the Freedom of Information Act, as amended, 5 U.S.C. § 552 ("FOIA"). If the Corps of Engineers claims an exemption for any requested records or portions of requested records, FOIA requires that the Corps of Engineers provide all reasonably segregable, non-exempt portion of such records together with a



Ms. Jennifer Misciagna
August 5, 2008
Page 2

detailed list and description of the records or portions thereof for which the Corps of Engineers claims an exemption and a discussion of the reasoning supporting the claimed exemption. To the extent that documents are located before the entire FOIA search is complete, we request that the Corps of Engineers provide a partial response to our request as information becomes available.

Holland & Knight will reimburse the Corps of Engineers for the reasonable costs of producing the requested records provided that such costs in connection with this specific request do not exceed \$250. If the Corps of Engineers expects such costs to exceed \$250 as it relates to this specific requests, please contact me for further instructions.

Sincerely,

HOLLAND & KNIGHT LLP



Dominic C. MacKenzie

DCM:ast
cc: Becky Schaffer, Esq.
Elliot Grosh, P.E.

5522194_v1



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY

JACKSONVILLE DISTRICT CORPS OF ENGINEERS
P.O. BOX 4970
JACKSONVILLE, FLORIDA 32232-4970

SEP 9 2008

Office of Counsel

Attention: Mr. Dominic C. MacKenzie
Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville FL 32202-3622

Dear Mr. MacKenzie:

This letter is in reference to your Freedom of Information Act (FOIA) request received by our office on August 6, 2008, and assigned FOIA No. 08-263. You requested Arcadis documents relating to the Ten Mile Creek project.

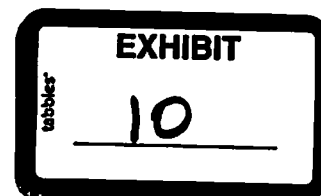
It is the policy of the Department of the Army to release the maximum amount of information under the FOIA, unless the information is exempt from release and a significant reason exists for non-disclosure. I have reviewed your request and concluded that it must be denied due to the deliberative process privilege and the attorney-work product privilege. My decision not to release this information is based on Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5).

As the District Counsel, Jacksonville District U.S. Army Corps of Engineers, I have been delegated the authority to deny requests for information under the FOIA by the South Atlantic Division Counsel. If you consider my response to be a denial of your request, you have the right to appeal this decision to Army General Counsel. The appeal letter must be addressed to the Army General Counsel and submitted to this office at U.S. Army Corps of Engineers, Jacksonville District, Attention: Office of Counsel (FOIA Officer), 701 San Marco Boulevard, Jacksonville, Florida 32207-8175. An Appeal must be received within 60 days of the date of this letter. The envelope containing the appeal should bear the notation "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in cursive script, reading "Patricia A. Morris".

Patricia A. Morris
District Counsel

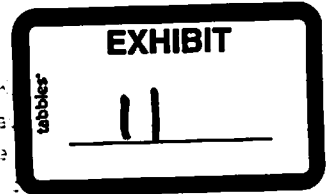


SEP 10 2008

Holland Knight

Tel: 904 368 2000
Fax: 904 368 1370

Holland & Knight
50 North La
Jacksonville
Florida 32202



Dominic C. MacKenzie
904 798 7303
donny.mackenzie@hklaw.com

Via Overnight Delivery

October 24, 2008

Army General Counsel
U.S. Army Corps of Engineers
Jacksonville District
Attn: Office of Counsel (FOIA Officer)
701 San Marco Boulevard
Jacksonville, FL 32207-8175

Re: FOIA No. 08-263
Ten Mile Creek Project, St. Lucie County, Florida
Request for Documents and Inspection per 5 U.S.C. § 552

FREEDOM OF INFORMATION ACT APPEAL

Dear Sir or Madam:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(6) ("FOIA"), Post, Buckley, Schuh, & Jernigan ("PBS&J"), through its counsel, hereby appeals the September 9, 2008 denial of its request for a copy of all written notes, memoranda, or reports prepared by Arcadis and/or Arcadis U.S., Inc. ("Arcadis") relating to Arcadis' work, review, and/or analysis of the Ten Mile Creek Project specifically including, but not limited to all reports concerning seepage into Ten Mile Creek from the reservoir (the "Arcadis documents"). A copy of the denial letter is attached as **Exhibit A**.

PBS&J submitted a FOIA request for the Arcadis documents on August 6, 2008. A copy of PBS&J's FOIA request is attached as **Exhibit B**. By letter dated September 9, 2008, the Jacksonville District Counsel denied this request pursuant to the fifth exemption of FOIA, § 552(b)(5), citing the deliberative process privilege and the attorney-work product privilege as bases.

Argument

Exemption five as a purported basis for the denial is both legally and factually wrong for at least three reasons: (1) the Arcadis documents were not prepared by a government agency; (2) the District Counsel did not properly provide the basis for the application of exemption five to

Army General Counsel
October 24, 2008
Page 2

the Arcadis documents; and (3) the Arcadis documents are not privileged attorney work product or deliberative process privileged. In addition, the District Counsel violated FOIA by failing to provide reasonably segregable portions of privileged documents. Therefore, the denial was improper and should be reversed with a direction to fulfill PBS&J's request and produce the requested documents.

Denial was not appropriate because the Arcadis documents were not prepared by a government agency.

The fifth exemption to FOIA states that disclosure is not required for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." § 552(b)(5). To qualify under exemption five of FOIA, a document must satisfy two conditions: its source must be a government agency, and it must fall within the ambit of a privilege against discovery. *Dep't of the Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). PBS&J's FOIA request sought documents prepared by Arcadis. To the extent that the Arcadis documents were not prepared by the U.S. Army Corps of Engineers (the "Corps") or another government agency, the Arcadis documents are not privileged from production under exemption five and should be produced.

Denial was not appropriate because the District Counsel did not properly provide the basis for the application of exemption five to the Arcadis documents.

An agency must provide sufficient information about the reasons for withholding a document for the requestor of information to determine whether there is an adequate factual basis for the alleged privilege. *Miccosukee Tribe of Indians of Fla.*, 516 F.3d at 1258. This is commonly accomplished through a *Vaughn* Index. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Specifically, the *Vaughn* Index should identify the reasons why a particular exemption is relevant and correlate those claims with the particular part of the withheld document to which they apply. *Miccosukee Tribe of Indians of Fla.*, 516 F.3d at 1258. The *Vaughn* Index should consist of a listing of each withheld document, or portion of a document, and should indicate the specific FOIA exemption applicable, and the specific agency justification for the non-disclosure. *Id.* at 1260. As for e-mail communication, the *Vaughn* Index should include a description of each e-mail's author and recipient, and a description of the contents of the e-mail. *Id.*; *St. Andrews Park, Inc. v. U.S. Dep't of the Army Corps of Eng'rs*, 299 F. Supp. 2d 1264, 1271 (S.D. Fla. 2003).

The District Counsel failed to provide the information normally contained in a *Vaughn* Index in violation of FOIA which should be considered a waiver of any privilege which may apply. Therefore, the District Counsel's denial should be reversed with a direction to fulfill PBS&J's request and produce the Arcadis documents.

Army General Counsel
October 24, 2008
Page 3

Denial was not appropriate because the Arcadis documents are not privileged attorney work product.

Under exemption five of FOIA, a government agency is not required to produce documents prepared by an attorney in anticipation of litigation. *Miccosukee Tribe of Indians of Fla.*, 516 F.3d at 1263. Without a *Vaughn* Index, it is impossible to analyze whether the attorney work product privilege is appropriately raised as a basis for withholding documents. Nevertheless, it is PBS&J's understanding that the request for the Arcadis documents did not include any documents prepared by an attorney in anticipation of litigation. Therefore, the attorney work product privilege is an inadequate basis for the denial of production of the Arcadis documents. To the extent that any of the Arcadis documents were not prepared by an attorney in anticipation of litigation, such documents should be produced.

Denial was not appropriate because the Arcadis documents are not deliberative process privileged.

The purpose of the deliberative process privilege is to protect an agency's decision-making process from the chilling effect disclosure may have. *Miccosukee Tribe of Indians of Fla.*, 516 F.3d at 1257. For the deliberative process privilege to apply, the document must have been prepared in order to assist an agency decision-maker in arriving at a decision and must make recommendations or express opinions on legal or policy matters. *Id.* The deliberative process privilege does not protect factual material which must be disclosed. *Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp.*, 376 F.3d 1270, 1278 (11th Cir. 2004). Without a *Vaughn* Index, it is impossible to analyze whether the deliberative process privilege is appropriately raised as a basis for withholding documents. To the extent that the requested documents are not pre-decisional and deliberative, or contain factual material, the deliberative process privilege does not apply and the documents should be produced.

Reasonably segregable portions of privileged documents were not produced in violation of FOIA.

FOIA provides, "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." § 552(b); *Miccosukee Tribe of Indians of Fla.*, 516 F.3d at 1257. The Corps failed to do this and instead decided to provide nothing as requested. Therefore, the District Counsel violated FOIA by failing to provide any documents or portions of documents that were not privileged under exemption five of FOIA.

Conclusion

The Corps has the burden of proving that the FOIA exemption is proper. *Miccosukee Tribe of Indians of Fla.*, 516 F.3d at 1258; *Moye, O'Brien, O'Rourke, Hogan & Pickert*, 376 F.3d at 1277. As shown above, the District Counsel has failed to carry this burden because she provided no justifiable basis to deny PBS&J's request. Moreover, she provided no *Vaughn* index and failed to produce reasonably segregable portions of the materials requested which are not

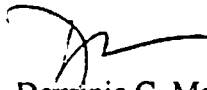
Army General Counsel
October 24, 2008
Page 4

exempt from production. Therefore, the denial was improper and should be reversed with a direction to fulfill PBS&J's request and produce the requested documents within the time period provided by FOIA. PBS&J invokes every right and objection it has to the Corps' conduct and actions in this matter and further reserves all of its rights relating to recourse accordingly.

Thank you for your coordination.

Very truly yours,

HOLLAND & KNIGHT LLP

A handwritten signature in black ink, appearing to read 'D. MacKenzie', with a stylized flourish extending to the right.

Dominic C. MacKenzie

Enc.

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REPLY TO
ATTENTION OF:

DEPARTMENT OF THE ARMY

JACKSONVILLE DISTRICT CORPS OF ENGINEERS
P.O. BOX 4970
JACKSONVILLE, FLORIDA 32232-0970

SEP 9 2008

Office of Counsel

Attention: Mr. Dominic C. MacKenzie
Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville FL 32202-3622

Dear Mr. MacKenzie:

This letter is in reference to your Freedom of Information Act (FOIA) request received by our office on August 6, 2008, and assigned FOIA No. 08-263. You requested Arcadis documents relating to the Ten Mile Creek project.

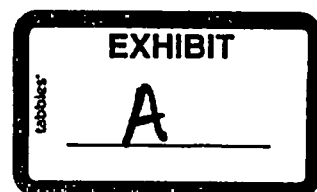
It is the policy of the Department of the Army to release the maximum amount of information under the FOIA, unless the information is exempt from release and a significant reason exists for non-disclosure. I have reviewed your request and concluded that it must be denied due to the deliberative process privilege and the attorney-work product privilege. My decision not to release this information is based on Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5).

As the District Counsel, Jacksonville District U.S. Army Corps of Engineers, I have been delegated the authority to deny requests for information under the FOIA by the South Atlantic Division Counsel. If you consider my response to be a denial of your request, you have the right to appeal this decision to Army General Counsel. The appeal letter must be addressed to the Army General Counsel and submitted to this office at U.S. Army Corps of Engineers, Jacksonville District, Attention: Office of Counsel (FOIA Officer), 701 San Marco Boulevard, Jacksonville, Florida 32207-8175. An Appeal must be received within 60 days of the date of this letter. The envelope containing the appeal should bear the notation "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in cursive script, reading "Patricia A. Morris".

Patricia A. Morris
District Counsel



SEP 10 2008

Holland+Knight

Tel 904 353 2000
Fax 904 358 1872

Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville, FL 32202-3622
www.hklaw.com

August 6, 2008

DOMINIC C. MACKENZIE
904-798-7303
InternetAddress:
donny.mackenzie@hklaw.com

PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

VIA FACSIMILE 904-232-1141

Ms. Jennifer Misciagna
Freedom of Information Officer
U.S. Army Corps of Engineers
Jacksonville District
701 San Marco Blvd.
Jacksonville, FL 32207

Re: Ten Mile Creek Project, St. Lucie County, Florida
Request for Documents and Inspection per 5 U.S.C. § 552 ("FOIA")

Dear Ms. Misciagna:

Post, Buckley, Schuh, & Jernigan respectfully requests that it be provided a true and correct copy of all written notes, memoranda, or reports prepared by Arcadis and/or Arcadis U.S., Inc. ("Arcadis") relating to Arcadis' work, review, and/or analysis of the Ten Mile Creek project specifically including, but not limited to all reports concerning seepage into Ten Mile Creek from the reservoir.

In addition, PBS&J reiterates its recent request that it be granted access to review and inspect the premises and project in question. When we last communicated, you indicated that dates for such inspection would be forthcoming. To facilitate this matter, the following dates are amenable to my clients and its expert witness consultants for the inspection:

August 23, 24, 25, 26, 27, 29, 30 and 31.

September 1, 2, 3, 8, 9, 10, 12, 16, 17, 18, 19, 22, 23, 24, 25 and 26.

Please let me know as soon as possible when this inspection may occur.

To the extent necessary, please consider this request as one brought under the Freedom of Information Act, as amended, 5 U.S.C. § 552 ("FOIA"). If the Corps of Engineers claims an exemption for any requested records or portions of requested records, FOIA requires that the Corps of Engineers provide all reasonably segregable, non-exempt portion of such records together with a



Ms. Jennifer Misciagna
August 5, 2008
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detailed list and description of the records or portions thereof for which the Corps of Engineers claims an exemption and a discussion of the reasoning supporting the claimed exemption. To the extent that documents are located before the entire FOIA search is complete, we request that the Corps of Engineers provide a partial response to our request as information becomes available.

Holland & Knight will reimburse the Corps of Engineers for the reasonable costs of producing the requested records provided that such costs in connection with this specific request do not exceed \$250. If the Corps of Engineers expects such costs to exceed \$250 as it relates to this specific requests, please contact me for further instructions.

Sincerely,

HOLLAND & KNIGHT LLP

A handwritten signature in black ink, appearing to read 'D. MacKenzie', with a stylized flourish at the end.

Dominic C. MacKenzie

DCM:ast

cc: Becky Schaffer, Esq.
Elliot Grosh, P.E.

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